83-316

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1983

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FILED
JUL 13 1983
ALEXANDER L. STEVAS,
CLERK

VITTORIO LEONE, RAMON MARTINEZ, ANTONIO PALOMBA, GIUSEPPI SANTANGELO, HEBER CABRERA SOSA, HUGO ARZUGA, RAUL G. LATORRE, DANIEL O. BARBOSA, CARLOS ALBERTO GIACOMINO, RADOLFA C. AGUIRE, HEBER WILSON CABRERA, ALMARO CARRATU, LEONCIO CARRASCO, GIUSEPPI ALLOTA and CARLOS OLIVERA, OMAR LEMES, MARIO ARESMONDI, MOISES WALTER CARRASCO and VINCENZO ABATE

Petitioner

v.

COSMOPOLITAN SHIPPING CO., S.A. ETC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Counsel for Petitioner

July 13, 1983

QUESTIONS PRESENTED

1. Whether a federal court of appeals, in affirming a district court's dismissal of seamen's personal injury claims pursuant to Fed. R. Cir. P. (37)(b)(2)(c), has sanctioned an unacceptable departure from the accepted and usual course of judicial proceedings on the part of the district court, thus warranting the exercise of the Supreme Court's of United States power of supervision?

2. Whether a district court's dismissal pursuant to Fed. R. Cir. P. (37)(b)(2)(c) of fifteen seamen's personal injury claims is a decision so drastic and capricious as to constitute an unconstitutional deprivation of claimants' property rights without due process of law, as well as being a violation of the principles of fairness and equity, where the claims were allegedly dismissed because claimants' counsel did not produce claimants whose depositions were to be taken within 10 days of the date of trial solely as a result of counsel's reliance upon the assertions of the trial court's courtroom clerk that the claimants need not be produced until:

(a) the trial court set a firm date:

(b) the trial court's courtroom clerk notified counsel of the trial date so that all necessary depositions could, in fact, take place within 10 days of the trial date; and where claimants' counsel did not act with bad faith or an intentional disregard of a court order?

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STATEMENT OF JURISDICTION

Petitioners respectfully appeal the judgment of the Second Circuit Court of Appeals, which judgment was entered on April 14, 1983, affirming the original judgment of United States District Court for the Southern District of New York. The District Court entered its judgment upon November 30, 1982. No opinion was rendered by the Second Circuit Court of Appeals.

Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 USC 1254(1) (1982), which states:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods: (1) by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree..."

OPINION BELOW

The opinion of the District Court, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Second Circuit Court of Appeals.

STATUTORY PROVISIONS INVOLVED

Fed. R. Cir. P. 37(b)(2)(c):

Rule 37. Failure To Make Or Cooperate In Discovery: Sanctions

Rule 37 (b)(2)(c): An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

STATEMENT OF THE CASE

On March 20, 1977, while plying the Atlantic Ocean's navigable waters, respondent's vessel, the S.S. Claude Conway, exploded. This marine disaster caused great loss of life and suffering. Three days later on March 23, 1977, respondent, Cosmopolitan Shipping Company, the vessel's owner and operator, instituted suit in the United States District Court for the Southern District of New York. In that action respondents sought limitation of, or exoneration from, liability. The district court issued a monition that required the litigation in the limitation proceeding of all claims that arose from the accident. In accordance with the District Court's instructions, the claimants brought their action in the limitation proceeding. Of course, the liability issue in this case was postponed until the question of limitation of liability was resolved. Nevertheless, the petitioning ship owner noticed the deposition of a large number of claimants in order to probe the question of damages.

Because all of the claimants in this action are foreign nationals, counsel for both sides agreed that the depositions of the claimants with regard to damages could be delayed until immediately before the trial. And counsel for both sides understood and agreed that the claimants would be brought to this country only once; that the claimants' visit here would be for the purposes of the trial; and that each claimant's deposition regarding the issue of damages would be taken, and any medical examinations

performed, while claimants awaited trial concerning the question of damages.

Counsels' mutual agreement was made clear to the Honorable Robert L. Carter, the district court judge, at a pre-trial conference held before him on December 11, 1980. On August 7, 1981, a stipulation agreement between counsel for each side was presented to the court for signature. This mutually agreed upon document dealt with two separate and distinct matters (23A): First, it initially required claimants to supply medical reports within a 60 day period beginning on August 7, 1981. Second, it reiterated counsels' agreement that claimants were to be made available for deposition and medical examination not later than 10 days prior to trial.

In order for petitioners to comply with the consent order, a trial date had to be fixed. Petitioners therefore communicated with Judge Carter's Deputy Clerk, a Mr. McCollough. The purpose of the communication was the ascertainment of the trial date. That date, once learned, would function as a fixed time around which the discovery could be scheduled.

Mr. McCollough assured petitioners that he was well aware of the problem of a trial date, since discovery on the damage issue was being held up pending the setting of that date. Mr. McCollough then asserted that he would supply specific trial dates, and that the dates supplied would provide claimants' counsel ample time in which to comply with the discovery order. Finally, Mr. McCollough led claimants' counsel to believe that he was working on the trial dates, and that nothing need be undertaken

until the dates were firmly fixed.

Claimants' counsel relied upon Mr. McCollough's assertions. We contend that such reliance was justified as Mr. McCollough held himself out to be, and in fact was, the Court's representative; he was vested with both real and apparent authority to deal with these matters; and Mr. McCollough should have known that his assertions would induce counsel to undertake a course of action that would ultimately harm their clients' interests. Needless to say, apart from the actual calling of trial on the issue of limitation, no trial date whatever was afforded counsel.

On May 28, 1982, Judge Carter's chambers advised counsel that the matter had been set for trial beginning on June 9, 1982. At the time counsel was reached by Judge Carter's chambers, the claimants were in their native lands awaiting receipt of a trial date so as to enable them to comply with the Court's 10 day order. A request for a continuance was denied.

The trial commenced as scheduled on June 9, 1982. Each claimant appeared in court. The ship owner for the first time formally admitted liability. Immediately upon doing so he moved to dismiss those claims which are the subject matter of this petition. The motion was based upon the consent order of August 7, 1981, which required all claimants to appear for deposition and medical examinations not less than 10 days before trial.

The unannounced call of the case for trial coupled with the ship owner's admission of liability effectively prevented the claimants from complying

with the order of August 7, 1981. The court granted the ship owner's motion and dismissed the claim of fifteen seamen who were injured in this maritime disaster.

The dismissal was affirmed by the Second Circuit. It is important to underscore the fact that the court's opinion in denying the motion for reconsideration is designed to give a reviewing court the impression that the arguable infraction was only the last of a series of infractions, and that the prior procedural history somehow mollified the ruthless nature of the order of dismissal. A review of the record, however, fails to elicit a solitary violation of a court order on the part of present counsel. The docket entries (in this case) are void of any breach on the part of claimants' counsel of any court order. Much is made of an attempt to extend the time for compliance with an order of the court requiring medical reports to be submitted within a certain period of time. This request was necessitated by the fact that it was necessary to send people to Uruguay and Italy in order to obtain the records. At any rate, the extension of time was granted and the order was complied with.

The United States District Court for the Southern District of New York had jurisdiction over this claim pursuant to 28 U.S.C. 1333 (1)(1982):

> "The district courts shall have original jurisdiction exclusive of the courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

ARGUMENT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE APPROPRIATE STANDARD TO BE EMPLOYED IN THE DISMISSAL OF CASES UNDER FED. R. CIR. P. 37(a)(2) AND IN THIS CONFLICT ESTABLISHING THAT THE COURT BELOW VIOLATED MINIMAL REQUIREMENTS OF FAIRNESS, AND CONSTITUTIONAL PROVISIONS AGAINST DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

It is well established among the circuits that dismissal with prejudice for failure to comply with a discovery rule is a harsh remedy to be utilized only in extreme situations. Thomas E. Titus v. Mercedes Benz of North America No. 81-236 (3d Cir. filed December 13, 1982); Donnelly v. Johns-Manville Corp., 677 F.2d 339 (3d Cir. 1982); Black Panther Party v. Smith, 661 F.2d 1243 (D.C. Cir. 1981); Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957).

In determining the situation which is sufficiently extreme to call into play the harsh remedy of dismissal, the Courts uniformly determine that one cannot justifiably deny a party's fair day in court except upon a serious showing of willful default. Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957).

In the case at Bar, claimants can hardly be found to have willfully failed to comply with the consent order of August 7, 1981, or to have acted in bad faith. Counsel diligently made inquiries to the trial judge's deputy clerk for a specific date so as to comply with the consent order of

August 7, 1982. Plaintiff's counsel can hardly be found to have been willful in view of its reliance upon the clerk's representations that counsel would be advised of a specific trial date and that counsel need not proceed with the depositions and medical examinations of claimants until a specific trial date was set.

Nor should the court order be permitted to stand on the basis of court calendar congestion. As was stated in the case of Beary v. City of Rye, 601 F.2d 62 (2d Cir. 1979) "The Judge must take care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard." There have been repeated warnings that a court must not let its zeal for a tidy calendar overcome its duty to do justice. (David v. United Food Company 402 F.2d 328 (2d Cir. 1968), cert. denied, 393 U.S. 1085 (1969). Finally, in applying the applicable legal principles, it has been mandated by the Appella e Courts that it is necessary for a district judge to consider whether lesser sanctions than dismissal would better serve the interests of justice where a party fails to comply with a court order. Titus v. Mercedes Benz of North America No. 81-236 (3d Cir. filed December 13, 1982). It is clear that no consideration of this type was at any time afforded the claimants.

Finally, it must be remembered that 15 citizens of foreign countries had their cases summarily dismissed after they were forced to bring their claims in the United States District Court for the Southern

District of New York by reason of the operation of the limitation of liability statutes. After waiting years to have their claims resolved and while they were in court prepared to testify, the District Judge summarily dismissed their claims. Had this happened to a group of American citizens in Uruguay the State Department would have been up in arms. One cannot help but be troubled by the fact that these citizens of South America and Italy were the recipients of such harsh and unreasonable conduct by a trial judge whose only real basis for action was a clearing of his docket which clearing was exaggerated by the fact that he was going on vacation.

These foreign citizens who did not contribute to their present situation at all deserve better treatment from our judicial system. At the outset, they (the claimants) were aboard a vessel which exploded at sea. They did not contribute to the explosion. They were forced to come into the United States District Court in order to pursue their claim or waive their claim. They had nothing to do with the proposed scheduling of their depositions nor with the fact that their depositions were not held. They made themselves available to appear in the United States as soon as they were advised that a date certain had been set and the date for the taking of their deposition agreed upon. They were all in attendance at trial. Under these circumstances, how could anyone assert that they were afforded that type of fair play which our judicial system requires? Judgment of the courts below should be reversed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

Marvin I. Barish

APPENDIX

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

Vittorio Leone, et. al. (Petitioner or Appellant) vs. Cosmopolitan Shipping Co., S.A. (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for _____

Vittorio Loene, et. al. (see attached)

(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Marvin I. Barish

(Type or print) Name Marvin I. Barish

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Complaint	:	77 Civ. 1425 (RLC)
of	:	
COSMOPOLITAN SHIPPING COMPANY, S.A., as owner of the 26,650 gross ton oil tanker "CLAUDE CONWAY" for exoneration from or limitation of liability in a cause of limitation civil and maritime.	:	

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CARTER, District Judge

O P I N I O N

Summary of the Procedural History of this Litigation

The claims of Vittorio Leone, Ramon Martinez, Antonio Palomba, Guiseppe Santangelo, Heber Cabrera Sosa, Hugo Arzuga, Raul G. Latorre, Daniel O. Barbosa, Carlos Alberto Giacomino, Radolfa C. Aguire, Heber Wilson Cabrera, Almaro Carratu, Leoncio Carrasco, Giuseppi Allota and Carlos Olivera, Omar Lemes, Mario Aresmondi, Moises Walter Carrasco and Vincenzo Abate for damages resulting from injuries sustained on March 20, 1977, when an explosion occurred on the 26,650 gross ton oil tanker "Claude Conway" owned by the Cosmopolitan Shipping Company ("Cosmopolitan"), came for trial on June 8, 1982. On motion of the petitioner, Cosmopolitan, all claims except those of Lemes, Aresmondi, Abate and Carrasco were dismissed.

This matter had been pending in this court since March 23, 1977, and at the time of trial was the oldest case on the court's calendar. On September 30, 1977, at the first pretrial conference in the case, the parties were given until March 31, 1978, to complete the discovery and to file their pretrial order. That deadline was not met. On May 15, 1978, a motion was filed on behalf of Cabrera, Arzuga, Barbosa, Olivera, Aguire, Martinez and LaTorre to substitute the firm of Adler, Barish, Daniels, Levin & Creskoff ("Barish firm") in place of Kenneth Heller as counsel. A stipulation effecting that substitution was so ordered on May 28, 1978, and on June 15, 1978,

Abate and Carrasco were also allowed to make the same substitution of counsel, the Barish firm for Kenneth Heller. On June 19, 1978, the matter was referred to Magistrate Raby to supervise the completion of all discovery. On August 27, 1979, a notice to take the depositions of Abate, Aguire, Aresmondi, Arzuga, Barbosa, Cabrera, Santangelo, Palomba, Carrasco, Olivera, Carratu, Martinez, Giocomino, Leone, LaTorre and Lemes was served on counsel for the claimants returnable on September 24, 1979, and from day-to-day to completion. No response was made to that notice. On October 23, 1979, an amended pretrial schedule providing for completion of all discovery by December 7, 1979, and submission of the pretrial order on December 14, 1979, was made operative. The pretrial order was not filed on the prescribed date. Both sides requested permission to submit the order on January 11, 1980. Such permission was given, but the order was not filed on January 11. On May 16, 1980, some months later, Marvin Barish advised Magistrate Raby that he was prepared to proceed to trial on reasonable notice.

In the meantime various claimants were settling their claims, reducing the claimants remaining to those represented by the Barish firm. At the end of October, 1980, the parties were informed by the court that the issue of limitation of liability would probably be called for hearing during the week of November 24, 1980. By letter dated November 12, 1980, petitioner's counsel advised the court that it had been recommended to their client that the latter not contact liability and that approval of

that recommendation was expected by November 19, 1980. Under these circumstances counsel requested that the scheduled trial on the liability question be postponed, and that the 17 or more damage claims still outstanding be set for trial no earlier than January 4, 1981.

At a pretrial conference held on December 12, 1980, the court was advised that liability had been conceded by the shipping company and that approximately 17 damage claims were still outstanding. Petitioner complained that it had noticed the depositions of claimants represented by the Barish firm, but there had been no response to the notice. Counsel was directed to make the claimants available to be deposed by petitioner and the parties were given until April 24, 1981, to complete all pretrial preparation for the trial of the damage claims.

On April 23, 1981, counsel for the claimants wrote requesting a 60 day extension of discovery on the grounds that a member of the Barish firm had to make a trip to the home countries of the claimants to secure current financial and medical information concerning the claimants the firm represented and that the lawyer who was to make the trip had left the firm suddenly and his replacement had sustained a serious leg injury. The extension was granted. On June 16, 1981, a further extension to July 24, 1981, was requested and granted.

On August 7, 1981, a so ordered stipulation was filed providing that claimants were to comply with all shipowner's requests for reports of physicians within 60 days from August 7, 1981, and that all

claimants were to be made available to shipowner's counsel so that they could be deposed and be examined by petitioner's physician not less than ten days before trial.

On December 1, 1981, the parties were advised by the court that this case might be reached for trial sometime in February, 1982. On January 13, 1982, after receipt of the above information, counsel for petitioner wrote Barish demanding that all claimants be produced to enable him to depose them and to have them undergo medical examinations. There was no response to that request.

On February 5, 1982, Marvin Barish sent a letter to the court clerk in reference to this case enclosing "a busy slip". The "busy slip" indicated that he was engaged in a trial in the Eastern District of Pennsylvania which was expected to take five days and that he would notify the court when that engagement was concluded. In any event, the court's criminal calendar prevented the case from being reached for trial in February, 1982, and as soon as that became evident, the parties were so advised.

On March 2, 1982, Barish sent the court a copy of a letter to counsel for the shipping company confirming that the weeks of May 10 and May 17, 1982, had been set aside for taking the depositions of all claimants. On March 12, 1982, counsel for the parties were notified that the court wanted to bring this case on for trial in late May or early June and that all pretrial preparations should be completed. During the set aside time of the week of May 10 and May 17, only four of 17 claimants were made available to petitioner.

On May 27, 1982, both sides were advised that the case would be reached for trial in June, and the next day they were told that the trial would begin on June 9 or 10. Counsel for claimants expressed serious reservations about meeting the date. On June 1, 1982, claimants' attorney said in a telephone conversation with the deputy court clerk that he needed more time for discovery. On instructions from the court he was told that no additional time would be granted and that the trial would go forward on June 9. On June 4, Barish called the court seeking a two week adjournment, which was refused. A conference with the court was demanded. That request was rejected and he was told that the trial would not be postponed.

Rulings at the Outset of the Trial

At the outset of the trial on June 9, 1982, counsel for petitioner moved to dismiss all claims except those of four claimants on the ground that up to the day of trial, only those four claimants had been made available to petitioner to be deposed and medically examined. In view of the continual and flagrant disregard of agreed upon scheduling orders by claimants' counsel, the motion to dismiss all claims was granted, except those of Lemes, Aresmondi, Abate and Carrasco, the four whom petitioner has been allowed to depose and to subject to physical examination. Diapulse Corp. of America v. Curtis Publishing Co., 374 F.2d 442, 447 (2d Cir. 1967); Krigger v. Texaco, Inc., 373 F. Supp. 108, 111 (W.D.N.Y. 1973); Bodnar v. Bodnar, 441 F.2d 1103, 1104 (5th Cir. 1971).

Dr. Kaplan, a proferred witness for claimants, was not permitted to testify because counsel for claimants had not made the doctor's report available to petitioner's counsel within 60 days from August 7, 1981, as stipulated and had made no other arrangements to provide petitioner's counsel with the doctor's report before trial. Chess Int'l v. Fashion Associates, Inc., 425 F. Supp. 234, 237 (S.D.N.Y. 1977) (MacMahon, J.); Bernet v. Pennsylvania R.R. Co., 14 F.R.D. 465 (E.D.Pa. 1953).

Trial Proceedings and Findings of Fact

The trial of the claims of the four remaining claimants proceeded. Each testified concerning his experiences and reactions when the ship exploded, his injuries, and the present status of his health. Dr. Martin Gutierrez, a psychiatrist who had treated Aresmondi and Carrasco, testified concerning his findings and conclusions as to the present physical and mental health of these two claimants. Dr. Mortimer Shapiro, who had examined Aresmondi and Carrasco for petitioner, testified concerning his diagnosis. Anthony Rober Amarante, official court reporter for the New York State Supreme Court, Kings County, testified as to his recollections concerning translating various documents from English to Spanish and Italian at Kennedy Airport on March 23, 1977, to Spanish speaking and Italian speaking claimants, respectively, and translating various documents from English to Spanish at petitioner's offices on March 29 to a Spanish speaking claimant. Andres Runne

testified about certain events at Camp Lejeune on March 22, 1977, and John Atwell testified about witnessing Abate's and Aresmondi's signatures being affixed to various documents at Kennedy Airport on March 23, 1977.

Claimant Omar Lemes is a 51 year old Uruguayan national. He testified that he was in his cabin preparing to rest when the explosion occurred. He went on deck and saw crew members lowering lifeboats and one crew member, who was not wearing a life vest, hanging from a rope ladder. He went below to his cabin to get that crew member a life vest. When he returned to deck, he lowered a lifeboat and boarded it. He was in the boat for about four hours before being rescued. His ankles were burned, apparently from sliding down the rope ladder to get to the lifeboat; he had an upset stomach and pains all over. When rescued, he was taken to Camp Lejeune where he had a complete checkup and remained for six days. He then came to New York. There he saw a psychiatrist and had some glass removed from his foot. On March 30, 1977, accompanied by a lawyer, he went to the offices of laywers for the shipowner where he received $1,575, which represented three months' wages (March, April, and May, 1977) and $350 to reimburse him for the loss of his personal belongings. He signed documents, produced at trial, acknowledging receipt of these monies, but testified that the documents, which are in English, were not translated to him before he signed the papers.

On his return to Montevideo, he saw a doctor for two or three months and then went to a psychiatrist

whom he still sees. At first he saw the psychiatrist once a week, then at 15-20 day intervals. The name of the psychiatrist was not given. About a year after the accident he went to Dr. Gutierrez at the suggestion of a Ronald Hirsh of the Barish firm. He testified that he suffers from insomnia and irritability, that he has a drinking problem and that the change in his personality has had an adverse impact on his marital life.

Mario Aresmondi, who is 55 years old, was on deck when the explosion occurred. He helped lower a lifeboat on the port side and then helped lower an inflatable rubber raft on the starboard side. He then went below deck to get a life vest for himself. Back on deck, he jumped into the water and after being in the water for a while, was able to board a life raft. He was on the life raft for four or five hours and then was transferred to a lifeboat. Ultimately, he was rescued and taken to Camp Lejeune. He suffered bodily pains and burning eyes. His ears hurt, and he was very nervous. He was taken to a hospital at Camp Lejeune where he was given a complete physical checkup. He remained in the hospital for 24-30 hours. From the hospital he was taken to a motel and remained there for about a day. Then he went to New York and was in that city for about five to six hours before enplaning for Montevideo on March 23. On his return to Montevideo, he received psychiatric treatment for 14 months. Thereafter he resumed his former occupation as a bus driver. Recently he has been driving a delivery truck. He claims to have an ulcer, which started in 1979. He concedes receiving $5,000 at

Kennedy Airport before leaving New York. According to petitioner's records, he was paid $1,400 for three months' pay, $350 to reimburse him for the loss of his personal belongings, and an additional $3,600. He signed papers acknowledging receipt of these funds and a release which contains words inserted in Aresmondi's own handwriting. He, too, testified that he did not understand any of the signed documents because they were not translated to him in Spanish.

Claimant Moises Walter Carrasco is 47 years old and a citizen of Uruguay. When the explosion on the "Claude Conway" occurred, Carrasco was asleep in his cabin. He awoke and ran to the deck, looking for his brother. He was told that his brother was already in a lifeboat. He returned to his cabin, dressed and went back on deck. He jumped overboard and remained in the water for some time before he was able to reach and board a life raft. From the life raft he was taken into a lifeboat and then returned to the stern section of the ship, which remained afloat. He suffered body pains, his ears hurt, and he had an attack of nerves. The next morning he and all on the battered vessel were sighted by a passing ship, which took them to Baltimore. There he was taken to a hospital where he was given a complete physical examination, including x-rays and treatment for a wound on his leg. From the hospital he was taken to the Lord Baltimore Hotel, and, according to his testimony, representatives of the shipowner "wanted to kick us out of the hotel. They didn't give us anything

to clean ourselves with, they didn't give us any clothes. We had to beg so they would give us something to eat." (Tr. 861).

He and a fellow crew member left the hotel and proceeded on their own to New York by bus. There they contacted and retained Kenneth Heller as their counsel. Carrasco saw a doctor and a psychiatrist. The latter prescribed valium. He testified that after about five days in New York, a company representative showed up at the hotel and told him that his wife was in a hospital, that his daughter was staying with relatives, and that he had to get back to Uruguay. He was told that the representative would make it possible for him to be paid for "breach of contract" and the things he had lost. He was taken out of one hotel and put up in another. On or about March 29, 1977, he went to the offices of Cosmopolitan Steamship Co. where he signed some papers which were not explained to him and received $7,500 without being told why he was being paid the money.

He has had four ship assignments since the accident but says he is too nervous to work. He has worked on ships when something was available, and he has also worked as a house painter, electrician and mechanic.

He admits attempting to shoot himself prior to sailing on the "Conway". He worked on ships from 1954-59, but his early work career was ashore for the National Port Authority.

Vincenzo Abate is an Italian national and was first engineer on the "Conway". He is well educated.

Although he denies knowledge of English, he does admit to perusing the New York Times, but says he only looks at the pictures. He was in the deck house when the explosion occurred, and the force of it stunned him for a time. After he recovered his faculties, he proceeded to the stern deck where he remained until rescued. He was taken to Camp Lejeune and spent the night at the hospital there. The next day representatives of the shipping company took him to a nearby hotel and arrangements were made for him to fly to New York and on to Italy. Representatives of the Italian Consulate were with him at Lejeune and at Kennedy Airport. In exchange for signing a release, he was paid $3,000 at the airport on March 23, 1977. He says that he did not understand the document. He has been working on a regular basis as before the accident. He complains of physical and mental disabilities resulting from the accident.

Dr. Martin Gutierrez is a psychiatrist practicing in Montevideo. Carrasco and Aresmondi were referred to him by Ronald Hirsh. Gutierrez agreed to treat the claimants on a contingency fee basis, and all of his expenses and expert witness fees are being paid for by the Barish firm. He started treating claimants one year after the accident. He prescribed drugs and psychotherapy. He testified that both were suffering from a traumatic neurosis. He attributes a hearing loss with which Aresmondi is afflicted, and an ulcerated condition, which first appeared two years later, to the accident. He was prepared to respond to a hypothetical question about

what the mental condition of these two claimants was a year before he set eyes on them. He treated Carrasco intensively at first "and then intensively after each time he came back from sea and in the three intervals, I have seen him sporadically." (Tr. 113). He said that Carrasco and Aresmondi would not be able to return to sea and would not be able to adjust to maritime life because of the accident.

Dr. Mortimer Shapiro, employed by the petitioner, examined Aresmondi and Carrasco. His diagnosis was that neither showed evidence of any neurological or psychiatric disorder. Neither, according to Shapiro, is suffering from any traumatic or physical injury caused by the accident.

Andres Runne met with those of the crew who were brought to Camp Lejeune. He found an enlisted man who spoke Spanish and who read the documents to the men in Spanish.

Anthony Amarante testified that he went to Kennedy Airport on the evening of March 23, 1977. He cannot recall specifics but recalls translating documents from English to Spanish and Italian for various people. It is his practice, when translating, to ask whether what is being read is understood, and he was certain that he followed that practice at Kennedy. His certificate is on documents signed from Aresmondi and Abate indicating that he had translated those documents from English to Spanish for Aresmondi and from English to Italian for Abate. In addition, representatives from the Italian Consulate were with Abate at Kennedy. On

March 29, 1977, Amarante was at the office of petitioner and translated a document from English to Spanish for Carrasco. His certificate is affixed.

The testimony of all the claimants and of their psychiatrists as to the extent, severity and duration of their injuries was simply not credible. Indeed, the testimony seemed orchestrated and contrived. It clearly must have been a traumatic experience for the claimants to have been on board the vessel when the explosion occurred and to have had to scramble for safety and a place on a lifeboat or life raft, and to have been adrift on these vessels or the broken stern of the ship for hours before being rescued. It would be improper to dismiss the fear and anxiety which they must have suffered and the physical injury which resulted from exposure to the elements. However, on reaching the United States and receiving medical attention the day after the explosion, none was kept hospitalized for more than 30 hours. No reports or records were introduced showing that their injuries had been diagnosed as severe or serious. All apparently were in good condition after thorough physical checkups. Claimants sought to depict a variety of present day physical and mental maladies which had surfaced years later as caused by the March 20, 1977, accident. No credible evidence supported those claims.

Moreover, the testimony that the signed documents were not read to them in English, in the face of Amarante's certification and testimony that these

documents were read to Carrasco, Aresmondi and Abate in their native tongue, must be discounted. Carrasco's testimony that he had to beg to be fed at the Lord Baltimore Hotel in Baltimore is so unbelievable as to undermine any credibility that survived his exaggerations about the nature and extent of his injuries.

Determination

Lemes' claims of current physical and mental disability based on the accident are totally without merit, and the testimony of Dr. Gutierrez is altogether unreliable. Lemes' testimony that when accompanied by his lawyer he signed documents acknowledging receipt of funds without knowing what the documents were is unworthy of belief. Nonetheless, it is clear that he was exposed to shock, fear and some physical damage which can be traced to the explosion. As I understand, Lemes received three months' pay and compensation for the loss of his belongings. He is entitled to an award of $10,000 in damages to compensate him for what he suffered at the time of the accident.

Aresmondi's testimony is simply incredible. He admits a pre-existing trauma to his head which resulted in a permanent depression of his skull, but which is not related to the explosion on the "Conway". I reject the testimony of Dr. Cutierrez as to Aresmondi's condition and accept the testimony of Dr. Mortimer Shapiro that Aresmondi suffers from no physical or mental disability resulting from his experiences aboard the "Conway".

Aresmondi received the sum of $3,600, plus three month's pay and a sum to cover the loss of his belongings. He signed a release to which he added his own words, which is some indication of understanding and sophistication. While Aresmondi testified that this document was not read to him in his native tongue, that, like most of his testimony, cannot be credited. Amarante, a professional interpreter and an official court interpreter for the New York State Supreme Court, Kings County, testified that he translated the documents in Aresmondi's native tongue. I credit that testimony. However, Aresmondi was not represented by counsel when he signed the release. While the documents were read to him and he understood what was read, I am not satisfied that he knew or that Amarante was in a position to explain the full legal implications of what was read and signed. Accordingly, the court awards him the sum of $7,400 for the trauma he was caused to suffer by the accident.

Carrasco's testimony concerning his present disabilities resulting from his experiences in March 20, 1977, is also discounted. I accept the testimony of Dr. Shapiro that he has no current mental or physical disabilities traceable to the "Conway". He was paid $7,500 and he signed a release. While I cannot credit his testimony that the document was not read to him in Spanish, nonetheless, he did not have the advice of counsel when he signed the paper. I find that the measure of the damages of each claimant approximates $10,000. The $7,500 Carrasco received included of $1,575, which constitutes three months wages, and $350 for loss of belongings. Thus, he was given $5,580 in addition to money to cover the

above items. An award of $4,420 would bring his total payment for damages traceable to the explosion to $10,000, which I find to be a fair recovery. Accordingly, he is awarded the sum of $4,420.

Abate is the final claimant. His testimony, like that of the other claimants, was a gross exaggeration. There is no credible testimony to support his claims of medical expenses and future loss of earnings. He was paid $3,000 for which he signed a release. There is no testimony that he was paid three months' wages or for loss of belongings, as were the other three. There was also no testimony as to what his pay scale was, although I believe he was paid considerably more than Lemes, Aresmondi and Carrasco. The $3,000 could well be sufficient to cover only three months' pay and a sum for loss of belongings. Since I am satisfied that each claimant is entitled to an award of $10,000, I award that sum to him.

IT IS SO ORDERED.

Dated: New York, New York
November 30, 1982

Robert L. Carter
U.S.D.C.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of April, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE WILLIAM H. TIMBERS,

HONORABLE THOMAS J. MESKILL,
Circuit Judges.

In the Matter of the Complaint of
COSMOPOLITAN SHIPPING CO., SA.A., etc.

Plaintiff-Appellee,

- against - 83-7006

VITTORIO LEONE, et al.,

Claimants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Appellants' contention that the trial judge refused to consider evidence of pain and suffering is unfounded. The judge's opinion reveals that he did consider it, and indeed awarded damages for pain and suffering to the four appellants whose claims went to trial. The opinion also disposes of all the other claims raised by appellants.

The judgments are affirmed substantially for the reasons stated by Judge Carter in his opnion, dated November 30, 1982.

WILFRED FEINBERG,
Chief Judge

WILLIAM H. TIMBERS,

THOMAS J. MESKILL,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Complaint

of

Cosmopolitan Shipping Company, S.A., as Owner of the 26,650 gross ton Oil Tanker "CLAUDE CONWAY" for Exoneration from or Limitation of Liability in a Cause of Limitation Civil and Maritime

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77 Civ. 1425 (RLC)

STIPULATION SETTLING MOTION

IT IS HEREBY STIPULATED by and between the attorneys for the opposing parties that Petitioner's motion for an order pursuant to F.R.C.P. 37(a)(2) compelling Claimants to comply with Petitioner's requests for discovery returnable on August 7, 1981, is hereby resolved as follows:

Claimants will fully comply with Petitioner's discovery requests concerning medical reports and reports of physicians within sixty (60) days from August 7, 1981.

It is further agreed all Claimants shall be made available to Petitioner's counsel not less than ten (10) days prior to trial for purposes of deposition and physical examinations.

Dated: New York, New York
August 6, 1981

PHILLIPS & CAPPIELLO, P.C.
of Counsel to:
ADLER, BARISH, LEVIN & CRESKOFF

By_____
Attorneys for Claimants
346 West 17th Street
New York, New York 10011

BIGHAM, ENGLAR, JONES &
HOUSTON

By_____
Attorney for Petitioner
14 Wall Street
New York, New York 10005

SO ORDERED:

_____
U. S. D. J.

77 civ 1425 JUDGE CARTER

DATE	NR.	PROCEEDINGS
3-23-77	1	Filed Complt. & Iss. Summs.
3-25-77	2	Fld Order approving Complainant's Stip of Value and Directing Iss. of Notice and restraining suits.....Carter,J. mn
3-25-77		Issued Notice to all claimants to file their claims by 4-29-77 or be defaulted. .....Clerk
3-25-77	3	Fld Complainant's Stip for value and Costs Bond#28-91-66 by Ins. Co. of N.A.
4-20-77	4	Fld Consent Order ent time to answer the complt to 5-30-77....CarterJ.
4-26-77	5	Fld Answer of S.A. de Nicolidakis
4-26-77	6	Fld Answer of M. C. del Rosario Aquino.
4-28-77	7	FLD ANSWER by G.Russo SP&B
5-2-77	8	Filed affdvt of Albert Yeny Perez de Martinez RE: Notice to claimant.
5-2-77	9	Fld Claim of Antonio Matascone for Franco Matascone deceased.
5-4-77	10	Fld Notice of filing of complt claiming the right to exoneration from or limitation of liability all persons having a claim must file it with the Clerk of the Court etc. on or before 4-29-77 or be defaulted..... Clerk. (with proof of publication in NY Law Journal on 3-29-77.)
5-4-77	11	Fld ANSWER & CLAIM of Gabriele Ferola. spb
5-11-77	12	Fld Antonio Matascone answer & Claim in behalf of Franco Matascone deceased. dd
5-25-77	13	Fld ANSWER & CLAIM of Heber Cabrera.
5-25-77	14	Fld " " " " Moises Carrasco
5-25-77	15	Fld " " " " Alvaro Carratu
5-25-77	16	Fld " " " " Mario Arismendi

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DATE	NR.	PROCEEDINGS
5-25-77	17	Fld ANSWER & CLAIM of Omar Lemes
5-25-77	18	Fld " " " " Gustavo Arzuaga
5-25-77	19	Fld " " " " Carols Olivera
5-25-77	20	Fld " " " " Leoncio Carrasco
5-25-77	21	Fld " " " " Daniel Q. Barboza
5-25-77	22	Fld " " " " Ricardo Fernandez
5-25-77	23	Fld " " " " Carlos A. Giacomino
5-25-77	24	Fld " " " " Rau l Latorre
5-25-77	25	Fld " " " " Rudolfo Aguirre
5-25-77	26	Fld " " " " Ramon Martinez
5-25-77	27	Fld Notice of Appearance for Claimants R. Martinez, O. Lemes, R. Latorre, C.A. Giacomino, R. Fernandez, A. Carratu, M. Carrasco, L. Carrasco, C. Olivera, H. Cabrera, D. Q. Barboza, G. Arzuaga, M. Arismendi, and R. Aguirre. kh
5-25-77	28	Fld Jury Demand for Claimants by atty Kenneth Heller.
5-27-77	29	Filed STIP & ORDER ext time of certain claimants to file answer ext. to 6-15-77. So ordered CARTER, J.
5-27-77	30	Filed Claimant's claim of Omar Lemes.
5-27-77	31	Filed " " " Vincenzo Abate.
5-27-77	32	Filed " " " Ruben de los Santos.
5-27-77	33	Filed " " " Ramon Martinez.
5-27-77	34	Filed " " " Giuseppe Allotta.
5-27-77	35	Filed " " " Giuseppe Santangelo.
5-27-77	36	Filed " " " Vittorio Leone/,.
5-27-77	37	Filed Ans. & Objections to petition for exoneration from or limitation of liability.
6-1-77	38	Fld STIP & ORDER ext time for claimants to file their claims to 6-30-77, CARTER,J.
6-15-77	39	Fld Answers & Claims of Bruno, Cappellini, Pub. Adm., Cty of NY, As Temp. Adm. of the estates of F. Agosta, V. Avelluto, S. Jurman, F. Marasconi, A. Piazza, L. Russo, A. Scotto DiCovella and O. Sricchia. evgg
6-28-77	40	Filed Pltff's List of claims.
6-30-77	41	Filed Claimant's Claim of Antonio Palomba.
6-30-77	42	Filed Claimant's Amended Answers & exceptions to petitio for exoneration from or limitation of liability.

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DATE	NR.	PROCEEDINGS
9-20-77	43	Fld PetitionersL. Carrasco; M. Carrasco; O. Lemes;G. Arzauga; H. Cabrera; C. Olivera; a. Carratu; M. Arismendi; R. Latorre; R. Aguirre; D.Barboza; C. Giacomino; R. Martinez; R. Fernandez's motion for an order temporarily lifting the inj issued by the Court..etc...ret 10-3-77.
9-20-77	44	Fld Petitioner's memo in support of their motion to lift the inj. etc.
10-7-77	45	Fld Pre trial Schedule Order....Carter,J.
10-14-77	46	Fld Opposing affdvt of pltff-complt.
10-17-77	47	Fld Order that the inj prohibiting the commencement or prosecution of any actions at law by any of the claimants in this action, issued in order dtd 3-24-77, is suspended solely for the purpose of allowing action at law to be filed by the claimant and the inj is suspended only until such law actions have filed etc. & that immediately upon filing of each and every such law action by claimants, each and every such law action be stayed, restrained and enj. until the hearing and determination of this action etc..... etc....Carter,J. mn
10-21-77	48	Fld Stip & Order that deposition of R. Gilder Jr is adj to 11-3-77..Carter,J.
10-21-77		Fld Memo end on bk of document#39=Accordingly, discovery is limited to matters concerning Technicare corp. and/or securities ...etc.....Carter,J. mn
11-23-77	49	Fld Claimant Francesco Iacona's motion for an order for leave to file a late claim .....ret 12-2-77-10AM
12-15-77	50	Fld Claimant F. Iacona's memo in support of motion for leave to file Late Claim.

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DATE	NR.	PROCEEDINGS
12-15-77		Filed Memo-End on document #49.....No opposing papers having been filed the motion to file a late claim is granted..... So Ordered.....CARTER.J. m/n
1-10-78	51	Fld Duplicate Copy of Matascone Claimants motion for order confirming proper representation and for order req w/d of claim purportedly filed by other counsel..... ret 1-6-78 10AM
1-11-78	52	Fld Eaton, Van Winkle, Greenspoon & Grutman's affdvt in opposition to Due's motion to be sole American counsel to represent the estate of F. Matascone etc.
1-12-78	53	Fld Answer & Claim of Francesco Iacona dd
1-24-78	54	Fld Affdvt by Claimants in response to affdvt in opposition by G. A. Woodfield.
2-1-78	55	Fld Conent to change attys for Claimants Antonio Matascone et al., to Local Counsel H. Fl Gerber Jr Esq.....Carter,J. mn
2-24-78	56	Fld Claimants V. Abate, et al's req for production of Documents.
2-28-78	57	Fld Opinion#46913....Consequently, upon a proper showing to this Court, within the specified 60 day period, that one of the Matascone Claimants has been designated by an Italian court to represent the estate of the deceased, Franco Matascone, that representative will be permitted to go forward and prosecute this action on behalf of all the Matascone Claimants, and Due Dodson will be confirmed as his proper legal representative. It is so Ordered....Carter,J. mn
3-6-78	58	Fld Bruno Cappelini's Notice of Deposition of Cosmopolitan Ship. Co. by its Port Engineer.

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DATE	NR.	PROCEEDINGS
3-6-78	59	Fld Bruno Cappelini's Req. to Produce.
3-6-78	60	Fld Claimants herein request pltff to answer interrogs.
3-10-78	61	Fld NOTICE OF ENTRY OF order fld 2-28-78.
4-19-78	62	Fld Petitioner's Motion for an order to lift the Monition ent on 6-30-77 etc..... ret 4-28-78-10AM.
4-27-78	63	Fld Kenneth Heller's AFFIRmation in opposition to Claimant H. C Sosa's motion to file an action at law against the above captioned pltff..
5-5-78	64	Fld Ex Parte Order ext time to 6-15-78 for the Matascone claimants and the firm of Due to produce.etc.....Carter,J. mn
5-12-78		Fld memo End on Document#62=Motion Granted...So Ordered..Carter,J. mn
5-15-78	65	Fld Order that the Monition ent on 6-30-77 is temp lifted in order to permit claimant H. C. Sosa to file an action at law against the pltffs, said action to be stayed pending the outcome of the above action Limitation Proceedings...Carter,J. mn
5-15-78	66	Fld Claimants H. Wilson et al's Motion for an order substituting Aldeer Barish, Daniels, Levin & Creskoff as attys for said claimant in place of K. Heller Esq. etc.....ret 5-26-78-10AM Rm 518.
5-24-78	67	Fld Opinion#47239..Accordingly, upon submission of an appropriate order, the Public Administrator for the County of NY. will be enjoined from prosecuting his action in Surrogate's Court and moreover., will be ordered to discontinue that action. Settle Order on Notice..... Carter,J. mn

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DATE	NR.	PROCEEDINGS
6-2-78	68	Fld Order that the Public Administrator for the City of NY is ordered to w/d and discontinue the OSC fld 4-28-78, and now pending in the Surrogate's Court, Cty of NY, in the action entitled "In the Matter of Estate of F. Matascone" File no2856-1977: and the Public Administrator for the City of NY is enjoined from prosecuting in the Surrogate's Court any claim raised in the said OSC filed in that action....Carter,J. mn (certified copy to Surrogate's Court-County of NY)
6-14-78	69	Fld Claimants' A. Matascone, A. M. Matascone, Al Matascone, S. G. Matascone, R. Matascone, L. R. Matascone, P. Matascone, A. Matascone & M. Matascone, Motion for an order declaring them as proper personal representative of the Estate of Franco Matascone etc.....etc .....ret 6-23-78-10AM
6-14-78	70	Fld Exhibits to Motion of Claimants of the Estate of F. Matascone.
6-15-78	71	Fld Claims Notice of Motion for an order substituting Adler, Barish, Daniels, Levin & Creskoff as Attys for Claimant M. W. Carrasco..ret 6-30-78-10AM. Rm 518.
6-16-78	72	Fld Atty K. Heller's Affdvt in opposition to motion to substitute Adler, Barish, Daniel, Levin & Creskoff as attys for Claimants H. Wilson et al..in place of Atty K. Heller.
6-21-78	73	Fld Attys Phillips & Cappiello's Motion to be attys of record for Claimant M. Arismendi in place & stead of K. Heller Esq..ret 7-7-78-10AM Rm 518.
6-20-78	74	Fld Order of Reference to Mag Raby to hear & report on motions for substitution of Counsel..Complete Discovery & Pre Trial Order....So Ordered....Carter,J. mn

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DATE	NR.	PROCEEDINGS
6-21-78	75	Fld Claimants V. Abate et al's interrogs to Cosmopolitan Shipping.
6-29-78	76	Fld Claimants Affdvt of Richard J. Dodson stating that no appeal has been taken by any pty.
7-5-78	----	Filed Memo-Endorsed on motion dated 6-14-78- Motion Granted for reasons stated in open Court.....So Ordered. Carter.J. m/n
7-5-78	----	Filed MEMO-ENDORSED on motion (cross) undated- Motion dismissed as premature for reasons stated in open court concerning requisite submissions to be made to by Eaton Van Winkle Fir,,,,,,,,,So Ordered. Carter.J. m/n
7-09-78	77	Fld. claimants reply affirmation of Kenneth Heller in response to claimants motion for substitution of attys.
7-10-78	78	Filed ORDER, that "the MASTASCONE CLAIMANTS" be recognized as the personal repr., of the deceased (Franco Mastascone), and that the firm of Due' Dodson and de Gravelle be recognized as the proper legal repr, and that the Answer & Claim filed on behalf of Claimants by the firm Eaton,Van Winkle, Greenspoon & Grutman be hereby striken from the record.,..... etc.....So Ordered. Carter.J. m/n.
7-12-78	79	Filed transcript of record of proceedings dated 5-23-78.
7-27-78	80	Filed Claimants afdvt in response to Mr. Heller's afdvt etc.
7-27-78	81	Filed Brief in Support of Claimants Motion.
9-1-78	82	Fld Attys for Matascone Claimants' Motion for an order approving settlement and for order taxing costs against B. Cappellini etc. and his attys..etc..ret 9-8-78-10AM Rm 518.
9-15-78-	83	Fld Claimants' affdvt by K. Heller Re: Substitution of attys.
9-15-78	84	Fld Claimants' Memo " " " " Substitution of attys.

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DATE	NR.	PROCEEDINGS
9-19-78	85	Fld Law Firm Eaton, Van Winkler, Greenspoon & Grutman's Notice of Cross-Motion for an order denying the motion of Due, Dodson & de Gravelles' motion imposing the undersigned retaining and charging liens etc..ret 9-29-78-10AM
9-22-78	86	Fld Duplicate Original of report of the United States Magistrate....9-20-78..... Mag. Raby.
9-25-78	87	Fld Eaton Van Winkle Greenspoon & Grutman's memorandum of law law in support of their cross motion imposing their retaining & charging liens in this matter & for a determination of appropriate allocations of the fees & disbursements incurred by counsel
10-3-78	88	Fld Matascone family-claimants' memo in support of issuance of a prel inj
10-3-78	89	Fld Order that time for Due, Dodson & deGravelles to file papers in opposition to cross motion previously scheduled for 9-29-78 is ext to 10-6-78....Carter,J. mn
10-6-78	90	Fld R. Dodson's of Due Dodson & deGravelles, attys for claimants' to confirm settlement and tax costs..etc.
10-6-78	91	Fld Memo of Law in opposition to cross motion fld by Eaton, Van Winkle, Greenspoon & Grutman.
10-10-78	92	Fld Proof of Service of Claimants' atty of service of Affdvt & Memo fld 10-6-78.
9-18-78		Pre-trial Conference held by Mag. Raby
10-27-78	93	Fld Jeffrey K. Hass, dtd 10-27-78
10-24-78		Pre-trial Conference held by Mag. Raby
12-26-67	94	Filed Opinion # 48012=Accordingly, $1,000 is taxed against Grutman personally for costs and atty's fees in respect of the April proceedings before the Surrogate ans May 1978 clarifying proceedings in this court. So Ordered Carter,J. dtd 12-21-78 m/n

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DATE	NR.	PROCEEDINGS
01-05-78	95	Filed Cosmopolitan's Notice of Motion for an order altering or amending the order of Judge Carter dtd 12-26-78. Ret: 1-24-79
01-24-79	96	Filed Pltff's reply affirmation in response to the affdvt dtd 1-5-79 of Gary A. Woodfield. etc...
01-26-79	****	Filed Memo-end on paper # 95=Motion denied in its entirety. The issue was fully presented to the court, and counsel was aware that an application under S 1927 had been made, and that was the point when whatever additional accidental facts of law movant wished to present to the court should have been filed. Indeed a memorandum treating the 1927 issue was filed, by movant at that time. After decision, it now seeks to make a 2nd and apparently fuller representation. To allow movant to do that would be manefestly unfair. It is so ordered. Carter.J.m/n
01-29-79	97	Filed G. Russo's Notice of Motion and affdvt. for an order confirming him as a personal representative of the Estate Luigi Russooetc..Ret: 2-2-79.
01-31-79	98	Filed Judgment #79,0145 ordered that there be a judgment entered in favor of the law firm of Due'Dodson and deGravelles in the sum of $1,000.00.Carter,J. judgment entered 1-31-79. Clerk,m/n
02-06-79	99	Filed Eaton, Van Winkle, Greenspoon & Grutman's Notice of appeal to the U.S.C.A. from the order entered pn 1-26-79. m/n toDue Dodson, & deGravelles and Harvey E. Gerber.
02-14-79	100	Filed Bond #2524733 on Judgment # 79,0145 in the amt of $1,000.00 by Nationals Surety Corporation
02-21-79	100	Filed Amended Notice of Appeal to the U.S.C.A. by Eaton, Van Winkle, Greenspoon & Grutman form the order entered on 12-26-78. m/n to Due, Dodson & deGravelles; Harvey S. Gerber; Semel, Patrusky & Buchsbaum;

DATE	NR.	PROCEEDINGS
		Bigham, Englar, Jones & Houston; Hector, Paul, Olmos, Clerico; Phillips &Cappiello, Adler, Barish, Daniels, Levin &Creskoff; Kenneth Heller.
02-26-79	****	Filed Memo-end on paper # 97= Motion granted on consent. Carter,J.
02-28-79	101	Filed Transcript of record of proceedings dated 10-24-78.
03-16-79	****	Filed Memo-End on paper #66= Motion granted cor the reasons set forth in the reputed recommendation of Mag/ Raby dtd 9-20-78. So Ordered Carter,J. m/n
03-16-79	****	Filed Memo-end on paper #71= Motion granted for the reasons set forth in the report of Mag. Raby dtd 9-20-78. Carter,J. m/n
03-16-79	****	Filed Memo-end on paper # 73= Motion granted for the reasons set out in the report and recommendation of Mag. Raby dtd 9-20-78. Carter,J. m/n
03-28-79		Pre-Trial Conference Held by Mag. Raby.
04-16-79	102	Filed true copy of order from the U.S.C.A. that the appeal is dismissed without costs under conditions agreed to by the parties. (stipulated).
05-16-79	103	Filed Claimants' Supplement request for the production of documents.
05-16-79	104	Filed claimants' supplemental interrogs.
06-04-79	105	Filed Claimants' Notice of motion for an order compelling petitioner to ans, the interrogs ret: 6-15-79.
06-25-79	106	Filed Stip & Order that the time for the pltff to ans. interrogs by Messrs. Phillips & Cappiello is ext. to 6-29-79. So Ordered Carter,J.
06-26-79	107	Filed claimants Supplemental interrogs.
06-26-79	108	Filed claimants supplemental request for the production of documents.
06-29-79	***	Filed Memo-end on paper # 105= Motion disposed of in accordance with stipulation and order filed 6-25-79. So Ordered Carter,J. m/n

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DATE	NR.	PROCEEDINGS
08-09-79	110	Filed Claimant's affdvt & Notice of motion for an order compelling petitioner to answer all supplemental interrogs..Ret: 8-17-79.
08-17-79	111	Fld Petitioner Affidavit & Notice of Motion striking the supplemental Interrogatores Ret: 8-17-79.
08-17-79	112	Fld Claimants Affidavit in opposition to petitioner motion to strike the supplemental Interrogatories.
08-29-79	113	Filed pltff's answers to interrogs.
08-29-79	114	Filed petitioner's Notice to take Depositior of claimants listed on 9-24-79.
09-10-79	115	Filed Claimants' Notice to take Deposition of John Quinland on 11-27-79.
09-10-79	116	Filed Claimants' Notice to take Deposition of Ulisse Cosulich on 11-26-79.
09-10-79	117	Filed Claimants' Notice to take Deposition of Mario Stradini on 11-26-79.
09-12-79	118	Filed Claimants' Notice to take Deposition of John M. Newmarker on 11-27-79.
09-12-79	119	Filed Claimants' Notice to take Deposition of C. R. Poyner on 11-28-79.
09-12-79	120	Filed Claimants' Notice to take Deposition of R. A. Cady on 11-28-79. Subp. issued.
09-24-79	121	Fld Endorsement....etc... Claimant's motion to require petitioner to produce documents identified in claimants' supplemental requests is granted. Petitioner is to respond in writing to each request & is to answer fully. Petitioner to be allowed 10 days from the publication of this endorsement in the New York, Law Journal to produce the requested documents..... It is so ordered.....Carter, J. mn
9-26-79	----	Pre-Trial Conference Held by Mag. Raby.

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DATE	NR.	PROCEEDINGS
10-15-79	122	Fld Compromise Order.....Ordered...That Giovannina Russo is authorized to enter into a compromise of the cause of action for wrongful death sustained by Luigi Russo, deceased for the sum of $75,000...& ....etc,,..... & that a filing of a Bond be dispensed with & that upon full compliance with the terms of this order G. Russo is authorized to give a General release to Cosmopolitan Shipping Co., SA & the attys for the pltff are authorized to execute a Stip. of discontinuance in this action... so ordered.....Carter, J. mn
10-17-79	123	Fd Claimants Additional Interrogatories.
10-24-79	124	Fld Amended Pre-trial schedule Order.... Carter, J.
11-2-79	125	Filed Claimant's Affdvt. & Notice of Motion for an order purs. to Rule 37 of FRCP, precluding the petitioner from supporting its Petition for Limitation of Liability, etc. Ret. 11-16-79.
11-07-79	126	Filed Stip & Order that the action pending against Giovannina Russo.. is hereby Disc.. w/ prej..So Ordered Carter,J.
12-12-79	127	Filed Petitioner's affdvt in opposition to claimants' motion for sanctions.
12-12-79	128	Filed duplicate original of magistrate's memorandum & order= Accordingly, to the extent that this motion seeks imposition of sanctions against the petitioner the motion is denied. It is so ordered Raby, Magistrate
12-17-79	129	Filed Atty's for appellee change of address.
12-17-79	130	Filed " " " " " "
01-14-80	131	Filed Appellee's attys notice of change of firm name.
11-16-79	---	Pre-Trial Conference Held by Mag. Raby.

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DATE	NR.	PROCEEDINGS
02-06-80	132	Filed Joint pre-trial order...Carter,J.
7-29-81	133	Filed Petitioners affidavit and Notice of Motion for an order pur. to FRCP 37(a) compelling claimants to comply with petitioners request for discovery etc...Ret. 8-7-81 at 10:00 AM.
8-7-81	134	Filed Stip settling motion Claimants will fully comply with petitioner's Discovery requests etc., it is further agreed all claimants shall be made available to petitioners counsel not less than 10 days prior to trial for purposes of deposition and physical examinations...Carter, J.
2-10-82		Filed supplemental pretrial order...CARTER, J. NON-JURY TRIAL BEGUN & CONTINUED 6-9-82 NON-JURY TRIAL CONCLUDED 6-9-82
7-6-82		Filed pltff's proposed findings of fact and conclusions of law.
7-6-82		Filed claimant Vincenzo Abate's proposed findings of fact.
7-8-82		Filed Partial Judgment...Ordered that the claims of Rodolpho Aguirre, Guiseppe Allotta, Hugo Arzuaga, Daniel Barboza, Estate of Ruben de los Santos, Leoncio Carrasco, Alvaro Carratu, Carlos Giocomino, Raul LaTorre, Vito Leone, Ramon Martines, Carlos Olivera, Antonio Palomba, Guiseppe Santangelo and Heber Cabrera Sosa are dismissed with prejudice. CARTER, J. Judgment entered 7-9-82 CLERK mn
7-9-82		Filed claimants' affdvt & notice of motion for an order permitting the record to be supplemented prior to judgment and granting reconsideration of the Court's decision dismissing the actions of fourteen claimants. ret: 7-16-82

DATE	NR.	PROCEEDINGS
7-9-82		Filed claimants' memorandum in support of foregoing motion.
7-15-82		Filed petitioner's affdvt of John B. Shields in opposition to claimants' motions to supplement the record for record for reconsideration.
7-15-82		Filed petitioner's memorandum in opposition to claimants' post-trial motions.
7-21-82		Filed transcript of record of proceedings dated June 9, 10, 1982
8-30-82		Filed pltffs. notice of motion in the form of an offer of proof as to the testimony of Dr. Lawrence I. Kaplan, had he been permitted to testify.
9-28-82		Filed memo-endorsement on claimants' motion dated 7-9-82 for an order permitting the record to be supplemented: Motion denied....CARTER, J. m/n
9-28-82		Filed memo-endorsement on claimants' motion dated 8-30-82 re offer of proof as to the testimony of Dr. Lawrence I. Kaplan: Motion denied...CARTER, J. mn
12-1-82		Filed Opinion #53970...Lemes is entitled to an award of $10,000.00 in damages to compensate him for what he suffered at the time of the accident...Aresmondi is awarded the sum of $7,400.00 for the trauma he was caused to suffer by the accident...Carrasco is awarded the sum of $4,420.00....Since I am satisfied that each claimant is entitled to an award of $10,000.00, I award that sum to Abate. CARTER, J. m/n csc
12-22-82		Filed Judgment #82,1770...Ordered that the following claimants recover damages from complainant-petitioner Cosmopolitan Shipping

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DATE	NR.	PROCEEDINGS
		Co. S.A.: Omar Lemes--$10,000.00; Moises Carrasco--$4,420.00; Mario Arismendi--$7,400.00 and Vincenzo Abate--$10,000.00. CARTER, J. Judgment entered 12-22-82
12-29-82		Fld. defts. NOTICE OF APPEAL to the USCA for the Second Circuit from the order entered on 11-30-82...mailed notice to Bingham, Englar, Jones & Houston on 12-30-82.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By_____
Deputy Clerk

Office Supreme Court, U.S.
F I L E D
SEP 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

VITTORIO LEONE, RAMON MARTINEZ, ANTONIO PALOMBA, GIUSEPPI SANTANGELO, HEBER CABRERA SOSA, HUGO ARZUGA, RAUL G. LATORRE, DANIEL O. BARBOSA, CARLOS ALBERTO GIACOMINO, RADOLFA C. AGUIRE, HEBER WILSON CABRERA, ALMARO CARRATU, LEONCIO CARRASCO, GIUSEPPI ALLOTA and CARLOS OLIVERA, OMAR LEMES, MARIO ARESMONDI, MOISES WALTER CARRASCO and VINCENZO ABATE,

Petitioners,

—against—

COSMOPOLITAN SHIPPING CO., S.A., ETC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, COSMOPOLITAN SHIPPING COMPANY S.A. IN OPPOSITION

JOHN B. SHIELDS
Counsel for Respondent
Cosmopolitan Shipping Co. S.A.
14 Wall Street
New York, New York 10005

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BRIEF OF RESPONDENT, COSMOPOLITAN SHIPPING COMPANY S.A. IN OPPOSITION

Response to Petitioners' Statement of Case

The petitioners' brief does not contain an accurate statement of the case and is misleading.

Contrary to statement of petitioners' counsel, the Order of U.S.D.J. Robert Carter filed on August 7 (20th page of Petitioner's unnumbered appendix), is clear and unequivocal. It was substantially ignored. Only four claimants were produced for deposition and physical examination by vessel owners counsel prior to trial, although the weeks of May 10 and May 17, 1982, had been set aside.

Contrary to statement of petitioners' counsel, the District Court and petitioners' counsel were advised that liability had been conceded by this respondent* on December 12, 1980 (4th page of Petitioner's unnumbered appendix).

On March 12, 1982 counsel for the parties were advised by the Court that the case would be brought on for trial late in May or early in June (5th page of Petitioner's unnumbered appendix). Counsel for petitioner had three months notice of the commencement of trial which is contrary to his Statement of the Case wherein he claims a lack of timely notice.

Response to Question 1 Presented by Petitioner

There has been no departure from the accepted and usual course of judicial proceedings on the part of the District Court herein.

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*Cosmopolitan Shipping Co., S.A. is a privately held corporation and has one wholly owned subsidiary. It is affiliated with Cosmopolitan Shipping Company, Inc.

Decisions of other Courts of Appeals are not in conflict with the decisions of the District Court and the Court of Appeals herein.

Each case is to be determined on its own merits and record. *Diapulse Corporation of America* v. *Curtis Publishing Co.*, 374 F.2d 442, 447 (2d Cir.). At times United States Courts of Appeals have determined that a District Court has abused its discretion but, such abuse of discretion does not exist herein.

The record, as reflected in the opinion of the District Court (U.S.D.J. Carter) and the record filed with the United States Court of Appeals, Second Circuit, clearly forms a basis for the procedure adopted by Judge Carter.

The review function of the Courts at Appellate level is succinctly stated in *Compagnie Des Bauxites De Guinea* v. *Ins. Co. of N. Am.*, 651 F.2d 877 at pages 884-885:

> "We will reverse a sanction imposed pursuant to Fed. R. Civ. P. 37(b)(2) only if the district court abused its discretion. • • •"
>
> "Case law instructs that the district court's decision must be rationally related to the reasons given and the requirements of the rule. We are aided here by the trial court's explanation of the factors that led to its decision. An appellate court is not free to substitute its judgment for that of the trial court, because the rules have invested the court of first instance with the expression of that judgment. The review function is not plenary; to disturb the exercise we must find an abuse of authority, not merely the presence of an alternative reasonable choice. • • •" (citations omitted)

This Court in *National Hockey League* v. *Met Hockey Club*, 427 U.S. 639 sets forth the standards to be applied:

"The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing. E.g., C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2284, p. 765 (1970); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1211 (CA 8 1973); Baker v. F & F Investment, 470 F.2d 778, 781 (CA 2 1972). Certainly the findings contained in the memorandum opinion of the District Court quoted earlier in this opinion are fully supported by the record. * * *" (at page 642)

"But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. * * *" (at p. 643)

Again in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 at page 629, this Court affirmed that:

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted."

Response to Question 2 Presented by Petitioner

Question 2 as presented by petitioner is based on a false and misleading premise.

Although counsel were not advised of the precise date for commencement of trial until thirteen days prior thereto, the District Court had advised counsel for all parties on March 12, 1982 that trial would commence in late May or early June (5th page of Petitioner's unnumbered appendix). Petitioners' counsel had

sufficient knowledge of the imminence of trial to demand the setting aside of the weeks of May 10 and May 17, 1982 for the depositions of all parties represented by him (5th page of Petitioner's unnumbered appendix). As noted in Judge Carter's opinion, based upon the record before him, only four claimants appeared to be deposed and to submit to physical examinations, to the prejudice of respondent. The failure of the remaining petitioners to appear is to this day unexplained.

CONCLUSION

It is submitted that in the circumstances herein the granting of a writ of certiorari is not warranted.

Respectfully submitted,

JOHN B. SHIELDS
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